

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.840 OF 1996  
IN  
NOTICE OF MOTION NO.30 OF 1992  
IN  
SUIT NO.3562 OF 1992

Soshna D. Hargovan & Ors. ....Appellants  
V/s.  
Uttam Parbhoo Hargovan & Ors. ....Respondents

Mr.D.H. Mehta with Mr.A. Dasgupta i/b M/s.J.N. &  
Associates for the Appellants.

Mr.J.P. Sen with Mr.Mahesh Shukla i/b M/s.Desai &  
Diwanji for the Respondents.

**CORAM : DR.S. RADHAKRISHNAN &**  
**S.J. VAZIFDAR, JJ.**  
**DATED : 25TH JULY, 2006.**

**P.C. :**

1. This is an Appeal against the order of the learned single Judge appointing a Receiver in respect of the suit flat and directing the Receiver to allow the parties to the suit and their relatives and family members to temporarily occupy the suit flat whenever they visit Mumbai.

2. The Plaintiff and the four Defendants are brothers. The Plaintiff and Defendant No.1 having expired, the heirs have been brought on record. We

will however, for convenience, refer to the parties as they were originally impleaded.

3. Defendant No.1 is the Appellant. The Plaintiff is Respondent No.1. Respondent Nos.2, 3 and 4 are Defendant Nos.2, 3 and 4.

4. All the parties and even the heirs who have been brought on record permanently reside in Durban, South Africa.

5. The original Respondent No.1 has filed the suit for a declaration that the suit flat forms part of the joint family property of the late Parbhoo Hargovan consisting of the Plaintiff and the Defendants and their family members and in the alternative for a declaration that the Plaintiff and the Defendants are co-owners in respect of the suit flat. The Plaintiff also sought a perpetual injunction restraining Defendant No.1/Appellant from preventing or obstructing the other parties to the suit and their family members from enjoying the suit flat.

6. Admittedly there is no dispute that the flat was purchased in June, 1951 and that the share certificate dated 25.1.1951 was issued only in the name

of the Appellant/Defendant No.1. Nor is there any dispute that the out-goings, electricity bills and the society dues have been paid by the Appellant through-out. Further admittedly the flat has been maintained by the Appellant through-out.

7. The learned single Judge however, accepted the Plaintiff's contention only on the basis of Exhibit "B" to the affidavit in re-joinder which is a letter dated 5.9.1974. The learned single Judge was impressed by the fact that in the said letter the Appellant admitted the existence of the joint Hindu family and that the flat had been acquired for the purpose of providing residential accommodation for the Appellant and the members of the joint and undivided Hindu family whenever they visit Mumbai. This admission was considered sufficient by the learned single Judge to grant the impugned order.

8. We are with great respect unable to agree. Firstly, as we have already observed the flat stands in the name of Defendant No.1 and Defendant No.1 has maintained the same through-out. Secondly, it is the Plaintiff who contends that the share certificate does not disclose true position regarding the ownership of the flat. It was for the Plaintiff therefore, to

establish this case. The Plaintiff has failed to do so. The Plaintiff has failed to produce any evidence to indicate that the payment for the said flat has been made from out of the funds belonging to the joint and undivided Hindu family. We repeatedly asked Mr.Sen, the learned counsel appearing on behalf of the Plaintiff/Respondent No.1 to indicate any document or other proof which showed that the payment had been made not by the Appellant but from the joint family funds. He fairly conceded that there was no direct evidence in this regard. He however, referred to the correspondence between the parties which we shall now deal with.

9. Before dealing with the letter dated 5.9.1974 on the basis of which the learned single Judge has passed the impugned order it is necessary to note the context in which it was written. It was in reply to a letter dated 10.8.1974 addressed on behalf of Jayant Co-operative Housing Society Ltd in which the suit flat is situated. The said Housing Society alleged that the flat was being used as a guest house or hostel by various people which caused acute congestion, nuisance and annoyance to other members of the society. The Society therefore, called upon the Appellant to quit vacate and deliver to the society peaceful possession

of the said flat.

10. The letter dated 5.9.1974 was in reply to the said letter dated 10.8.1974. It is expressly stated in the Appellant's advocate letter that it is the Appellant who got himself admitted as a member of the society and as such a member acquired the said flat. It has further been expressly stated that the flat was acquired by the Appellant. The Appellant has not even indicated that the flat had been purchased by him on behalf of the joint family. What the Appellant has gone on to state in the said letter is that he acquired the flat "for the use thereof (as) a residence for himself and the members of the joint and undivided Hindu family consisting of himself, his five brothers and their respective families". This statement was made in the context of the grievance raised by the society about various other persons using the flat as a guest house. It does not by any stretch of imagination suggest or indicate an admission on the Appellant's part of the flat having been purchased for or on behalf of the Appellant.

11. Merely because the Appellant permitted the members of his family to use the same on their visits to Mumbai does not deprive him of the full ownership

right in respect thereof.

12. The correspondence relied upon by Mr. Sen militates against the Plaintiff's case. For instance in a letter dated 6.8.1950 addressed to his father, the Appellant stated that he was looking for residential accommodation. He stated that buying a property would be a heavy burden on him and would therefore be brought in partnership with T.N.B. and P & Sons. He further stated that the property would be such that three families could be accommodated independently. This was however not done.

. By another letter dated 18.10.1950, Defendant No.1 stated that he would consider about investing money in a residence next year as he would be a little free with money by then.

13. Thus the letters do not indicate any joint acquisition as yet.

14. It is however important to note that by a letter dated 15.12.1950, the Appellant inter-alia stated :-

. " On 12.12.50 I have purchased a flat at

Churchgate 'D' Road near Thakorbhai from the sum of Rs.25000/- Possession of which will be taken next week. The flat is situated ideally near Main Marine Line Road The flat consists of three rooms and one kitchen. I was to call you asking for remittance but in the meantime a cable came from you informing me the offer of \$ 9000/- for Roseburgh property to which I immediately replied as per copy attached herewith".

. Similarly, by a letter dated 2.2.1951, the Appellant stated :-

. "I have received all the remittance sent also the last \$ 100/- proceeds of which I have used up in purchasing the flat at Marine Drive as soon as I receive remittance by way of Drafts or Reutors from P & Co.".

15. The aforesaid letters relied upon by the Plaintiff support the Appellant's case that the flat had been purchased by him from the funds received by him in his individual capacity and not for or on behalf of the joint family.

16. We observed earlier that the onus was on the Plaintiff/original Respondent No.1 to establish his

case namely that though the share certificate stands in the name of the Appellant/Defendant No.1, the flat actually belongs to the joint family as it was purchased from the funds belonging to the joint family. We have already held that the Plaintiff has failed to discharge this burden. The doubt, if any, regarding the Plaintiff having been failed to establish his case is set at rest by the averment made by him in the affidavit in re-joinder to the effect that there is no HUF in respect of the South Africa assets.

17. In the circumstances, the Plaintiff has failed to make out any case much any less prima-facie case warranting grant of any interim reliefs. Despite the same, we intend protecting the rights, if any, of the Defendants by granting an injunction restraining the Appellant from disposing of the flat pending the hearing and final disposal of the suit.

18. In the circumstances, the Appeal is allowed. The Appellant shall however, not sell or encumber, or create any third party right, title and/or interest in, to, upon or in respect of the said flat without obtaining the leave of this Court.

. There shall be no order as to costs.

(DR.S. RADHAKRISHNAN, J.)

S.J. VAZIFDAR, J.)